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Learnings from Judicial Review Proceedings

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Local Authorities: Planning Functions

- **Plan Making:** City and County Development Plans, Local Area Plans
- Reserved Function of Elected Members (Section 12(11) PDA 2000 : In making the development plan the members **shall be restricted to considering the proper planning and sustainable development of the area**...statutory obligations...relevant policies of the Government or any Minister...
- **Development Management and Enforcement** (individual cases)
- Executive Function of Council Officials



Key Topics

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Judicial Review

Practicalities

Main grounds of review



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Plan-Making (1)

Interpretation of Development Plan

Consistency with NPF, Reasons & Considerations

“Have regard to”

Status of Guidelines within Plans



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Plan-Making (2)

Ministerial Directions

Section 15 of the Climate Act



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Environmental Assessments

Strategic Environmental Assessment (SEA)

Strategic Flood Risk Assessment (SFRA)

Environmental Impact Assessment (EIA)

Appropriate Assessment (AA)

Water Framework Directive (WFD)

Judicial review – What is it?

Challenge to the **lawfulness** of an act/omission of a public body

- Not a challenge to the merits

Presumption of validity

- Starting point

Short time limits

- 3 months (normal JR), 8 weeks (planning JR)

Main grounds for JR:

- Legal error
- Lack of fair procedures
- Failure to consider relevant material or consideration of irrelevant material
- Insufficient reasons
- Irrationality



Court Interpretation of Planning Documents

- There are specific rules of interpretation which the Court uses when interpreting statute e.g. the Planning and Development Act 2000
- Planning documents such as planning permissions and development plans *are not to be interpreted like statutes*
- ***They are given their ordinary meaning as would be understood by members of the public***
- The Court has the final say on what a development plan means but they will interpret them like a member of the public would
- Local authorities should therefore prepare development plans with this in mind, i.e. they will be interpreted as if by members of the public (not lawyers)



Consistency with National & Regional Plans

- Ireland has moved towards a plan-led approach where NPF/RSES and development plans and local plans work with each other to coordinate development strategically and in line with funding for infrastructure
- Section 10(1A) of the PDA 2000 requires a development plan to include a core strategy which shows that the development objectives are consistent, **as far as practicable**, with national and regional development objectives (i.e. National & Regional Policy Objectives NPOs and RPOs) and with Specific Planning Policy Requirements in Section 28 Guidelines.
- For NPOs/RPOs that are high level/ worded in an aspirational way, consistency means consistent generally across the county, not for every single site zoned.
- For more specific NPOs/RPOs, these may require consistency in specific circumstances.
- If not practicable to implement RPOs/NPOs (whether on a general/specific level) elected members must give reasons why it is not practicable.



Reasons and Irrelevant Considerations

- When elected members are making zoning decisions, reasons are required – they must be clear and adequate.
- Reasons can be gleaned from minutes of meeting(s) and motion papers filed in support of resolution.
- Reasons are never going to be as neat as in say a decision on a planning application so a bit more flexibility from the courts.
- Reasons must relate to proper planning and sustainable development.
- Elected members can only take relevant considerations into account for example questions of the identity of owners of land are generally irrelevant considerations.
- Reasons for going against the advice of the Chief Executive should be properly evidenced and justified.
- Local authority has no powers to give legally binding commitments in respect of future development plans – has to consider afresh what appropriate zoning of lands is having regard to relevant planning reasons.



“Have Regard To”

“A legal standard found in a number of statutory obligations on planning authorities

e.g. Planning authorities are required to:

- In making a development plan, have regard to the development plans of adjoining planning authorities (Section 9(4)) PDA
- Have regard to Section 28 guidelines in the performance of their functions (Section 28(1))
- Have regard to the development plan in making decisions on planning applications (Section 34(2)(a))
- “Have regard to” means consider, take into account. No requirement for mandatory compliance with, for example, Section 28 guidelines.
- Once it has been considered, it is for the decision maker to decide what weight to give it.
- Note: where the statutory provision uses an intensifier such as to have “due” regard to something or “appropriate and reasonable regard” - signals additional degree of weight to be given + general enhancement of the level of reasons that have to be given if such weight not afforded...



Status of Guidelines within Plans

Legal effect of Section 28 guidelines can be elevated from that of “have regard to” by the relevant development plan.

High Court case – South Dublin County Development Plan objective:

*“To ensure that the density of residential development makes efficient use of zoned lands and maximises the value of existing and planned infrastructure and services, including public transport, physical and social infrastructure, **in accordance with** the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas, DEHLG (2009)”*

- By stating that an objective of the development plan was to be carried out “in accordance” with the Guidelines the Council had enhanced the status of the Guidelines from one of “have regard to” to a duty to be “in compliance”.
- Care needs to be applied in wording of references to guidelines that are relevant to planning but which may require proper consideration and implementation in the preparation of the plan rather than slavish repetition .



Ministerial Directions

- Where the development plan is inconsistent with mandatory requirements in the PDA 2000, the Minister can direct the local authority to amend the Development Plan → This follows a recommendation from the OPR e.g. the inclusion of an objective in a development plan which is not consistent with a relevant NPO (and practicable for the development plan to be consistent).
- Prior to the final direction, significant process of consultation with members of the public and elected members
- Ministerial Direction, in effect, changes the development plan.
- The Direction can be challenged by way of judicial review and there have been a number of challenges in this regard including:
 - **Cork County Council v the Minister & OPR** (retail strategy and requirements in Section 28 guidelines);
 - **Friends of the Irish Environment v the Minister & Ors** (related to objective recognising inadequacy of noise insulation measures at Dublin Airport and inconsistency with NPO 65)
 - **Mount Salus Residents v ABP, the Minister, OPR & Ors** (related to O/O zoning objective and inconsistency with a number of NPOs/RPOs)



Section 15 Climate Act (as amended)

*“A relevant body shall, **in so far as practicable**, perform its functions in a manner consistent with—[e.g. the climate action plan, the national climate objective, etc]”*

- Original “have regard to” obligation – **Coyne v ABP**
 - “Have regard to” means consider / take account of
- New “in so far as practicable” obligation – **Coolglass Wind Farm v ABP**
 - Capable of being put into practice, not merely doing what is reasonable.
 - Well above merely having significant regard to something
 - The amendment significantly strengthened s.15 from
 - Practicably available decision that contributes towards s.15 goals



Environmental Assessment

Plans or programmes

SEA

SFRA

AA

NPF, RSES, CDPs, and LAPs

Projects

EIA

AA

WFD

Planning permissions and other consents

Key Takeaways

1. Litigation in planning has grown very significantly in recent years driven by a range of factors
2. Best strategy is to ensure a high degree of observance of statutory procedures taking account of ongoing decisions of the Courts at EU and national level.
3. Work closely with your Executive who are there to guide you and provide legal advice
4. The OPR will support planning authorities in learning from ongoing litigation



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